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Supreme Court, U. S.
AUG 29 1939
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

No. 329

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USSC

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF

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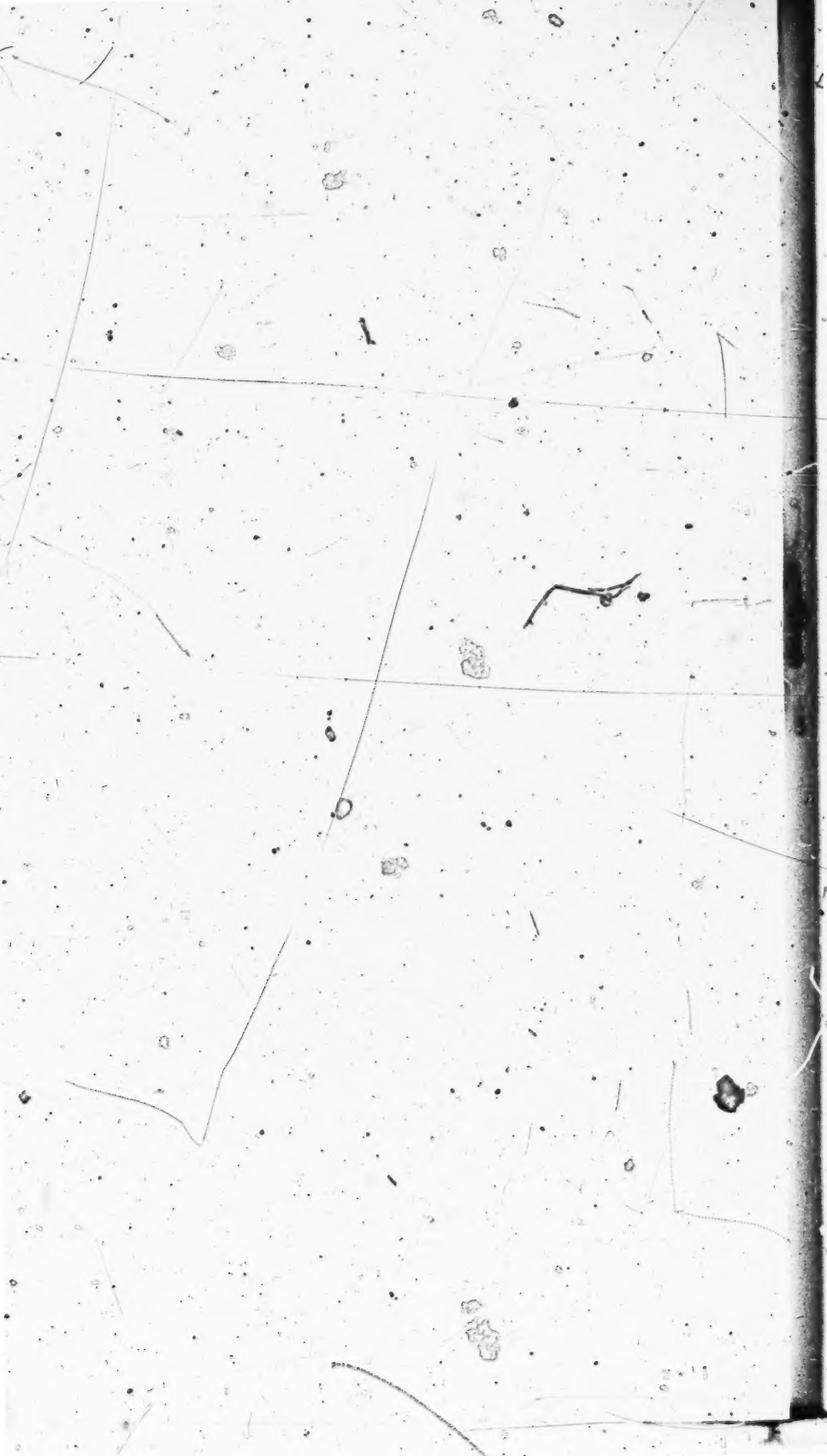

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IN THE

Supreme Court of the United States

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Henry Russell, Lawrence Miller, Charles Steers, and John P. Wing, co-partners doing business under the firm name of Russell, Miller and Carey, and Samuel A. Pleasants, defendants in the above-entitled action, respectfully petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit rendered therein May 29, 1939 (one Judge dissenting), 104 F.(2d) 169, R. 420. This decision affirmed the judg-

ment of the United States District Court for the Southern District of New York rendered in favor of the plaintiffs April 7, 1938, 20 F. Supp. 936, R. 357.

Summary Statement of Matter Involved

This is a representative action by J. S. Todd & Co. on behalf of themselves and other creditors of the Ohio Joint Stock Land Bank of Cincinnati, Ohio, against defendants, holders of record of certain shares in that Bank (R. 368). The action is brought pursuant to 12 United States Code § 812, providing in substance a double liability for shareholders of joint stock land banks.

Petitioners were not the beneficial owners of the shares in question. The petitioners Russell, Miller, Steers and Wing, co-partners in the New York brokerage firm of Russell, Miller and Carey, received 200 shares of stock for the account of one Grafton W. Minot, a customer, and transferred the stock to their names on the books of the bank (R. 376). The stock was subsequently delivered to the customer (R. 153). The petitioner Pleasants was a pledgee, who received 112½ shares of stock as collateral security for a loan, and being entitled under the terms of the pledge to have the stock transferred to his name, did so (R. 374-6).

The Ohio Joint Stock Land Bank was organized on January 12, 1923, with a capital of $250,000, and had its principal place of business at Cincinnati, Ohio (R. 230). On September 1, 1927, the bank failed to pay interest on its bonds, and in consequence was declared insolvent by the Federal Farm Loan Board (R. 75), its liabilities exceeding its assets by more than $250,000 (R. 371). J. S.

Horton was appointed receiver pursuant to the Farm Loan Act (R. 160-1).

The District Court found that the cause of action accrued April 6, 1928 (R. 354) and that plaintiffs herein, and "the creditors and bondholders, on whose behalf plaintiffs sue, had notice of the accrual of said cause of action on or about April 15, 1928" (R. 354). The Circuit Court of Appeals accepted this conclusion as undisputed (R. 423, 104 F. [2d] at 172).

The present action was not commenced until more than three years and eight months thereafter, that is, on December 16, 1931.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 28 United States Code § 347.

The judgment of the Circuit Court of Appeals herein was entered on May 29, 1939 (R. 430).

Questions Presented

1. Is the claim asserted by plaintiffs barred by the three-year statute of limitations, New York Civil Practice Act § 49 subd. 4 (as to all petitioners except Russell) and New York Civil Practice Act § 55 and California Code of Civil Procedure § 359 (as to petitioner Russell)?

2. Is the claim asserted by plaintiffs primarily one at law, or is it on the other hand wholly and exclusively equitable in nature?

3. In determining whether the cause of action is barred by limitations, or whether the conception of laches may be applied, is this Court bound by the applicable New York law?

4. Are plaintiffs guilty of laches?

5. Are mere record owners of joint stock land bank shares, having no beneficial interest therein but holding the same either as pledgees or as custodians for others, subject to the double liability imposed upon shareholders by 12 United States Code § 812?

Reasons for Allowing the Writ

1. The decision of the Circuit Court of Appeals determines important questions of Federal law, which have not been but which should be settled by this Court, viz.:

(a) That, in an action under 12 United States Code § 812, stockholders of joint stock land banks (and consequently stockholders in national farm loan associations, since § 744 is identical with § 812) are not entitled to plead in bar any statute of limitations.

(b) That holders of record of stock of joint stock land banks (and of national farm loan associations), who are mere nominal holders for the benefit of another or mere pledgees, are liable as the owners of the stock under § 812, although the Federal Farm Loan Act (§§ 641-1129) does not provide for access to stockholders' lists by creditors.

The above questions involve the interpretation of § 812 which restricts liability to ". . . the extent of the amount of

the stock *owned by* them . . ." Except for one District Court and the Massachusetts Court,[1] there has been no adjudication of the meaning of this language.

The importance of like questions of statutory construction, with regard to the Farm Loan Act, has heretofore been recognized by this Court in granting certiorari in *Wheeler* v. *Greene*, 279 U. S. 829, and *Christopher* v. *Brusselback*, 302 U. S. 672.

2. The decision below, in holding defendants not entitled to the benefit of the statute of limitations, is believed to be in conflict with

(a) *Platt* v. *Wilmot*, 193 U. S. 602, which applied the New York statute of limitations to an action to enforce the liability of a stockholder of a Nebraska bank, and the analogous rulings in *Pufahl* v. *Estate of Parks*, 299 U. S. 217; *Curtis* v. *Connly*, 257 U. S. 260; *McDonald* v. *Thompson*, 184 U. S. 71; *McClaine* v. *Rankin*, 197 U. S. 154; and

(b) *Metropolitan Bank* v. *St. Louis Dispatch Company*, 149 U. S. 436, 448, and *Baker* v. *Cummings*, 169 U. S. 189, 206, holding that courts of equity, where there is concurrent jurisdiction at law and in equity, are bound by the statute of limitations. The Circuit Court of Appeals is believed, in this regard, to have misapplied the rulings in *Wheeler* v. *Greene*, 280 U. S. 49, and *Christopher* v. *Brusselback*, 302 U. S. 500.

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[1]See Woolsey, *J.* in *Brusselback* v. *Cago Corp.*, 24 F. Supp. 524, 534, and *Holmberg* v. *Anchell*, 24 F. Supp. 594, 607; *Friede* v. *Mackey*, 10 N. E. (2d) 102 (Massachusetts 1937).

3. The decision below is also believed to be in conflict with *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, in failing to give effect to the New York law. New York Civil Practice Act § 195 provides plaintiffs with a concurrent remedy at law, available in Federal courts at the time this action was brought, and thus renders applicable the statute of limitations.

4. The decision of the Circuit Court of Appeals on three decisive points is believed to be in conflict with the decisions of other Circuit Courts of Appeal on the same points.

(a) The decision that the statute of limitations is not available to stockholders in Federal joint stock land banks is believed to be in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit in *Johnson* v. *Greene*, 88 F. (2d) 683, 684, and *Schram* v. *Poole*, 97 F. (2d) 566, 572.

(b) The decision that there is no concurrent jurisdiction at law fails to give effect to the New York law and is thus believed to be in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Schram* v. *Poole*, 97 F. (2d) 566.

(c) The decision that record shareholders of joint stock land banks, who are merely nominal holders for the benefit of another, or pledgees, are liable as owners of the stock is believed to be in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Heiden* v. *Cremin*, 66 F. (2d) 943, certiorari denied 290 U. S. 687.

5. In holding that record shareholders of joint stock land banks, who are merely nominal holders for the benefit of another, or pledgees, are *owners* of the stock within the meaning of § 812, the Circuit Court of Appeals is believed to have failed to give effect to the decision in *Pauly* v. *State Loan and Trust Co.*, 165 U. S. 606, and to have extended and misapplied the rulings in *National Bank* v. *Case*, 99 U. S. 628, and *Rankin* v. *Fidelity Trust Co.*, 189 U. S. 242.

Prayer

For the foregoing reasons, which are developed in more detail in the accompanying brief, your petitioners pray that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a day to be determined a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as is proper.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS, Petitioners,

by

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioners.

Dated, New York, N. Y., August 22, 1939.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinions of the United States District Court for the Southern District of New York on the motion to strike out the defense of limitations (R. 33-8; R. 338-49) and on final decree (R. 357-64) are reported respectively in 1 F. Supp. 788, and 20 F. Supp. 930 and 936. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 420-35) is reported in 104 F.(2d) 169, advance sheets for July 10, 1939.

Jurisdiction of this Court

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 29, 1939 (R. 430). The jurisdiction of this Court is invoked under Judicial Code § 240(a), 28 United States Code § 347(a), as amended by the Act of February 13, 1925.

Statement of the Case

A summary statement of the facts is given in the petition, pages 2 to 3 above.

Statutes Involved

12 United States Code § 812 provides:

> "Individual liability of shareholders. Shareholders of every joint-stock land bank organized under this chapter shall be held individually respon-

sible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of stock owned by them at the par value thereof, in addition to the amount paid in and represented by their shares. (July 17, 1916, c. 245, § 16, 39 Stat. 374.)"

New York Civil Practice Act § 49 provides, so far as material:

"§ 49. Actions to be commenced within three years.

The following actions must be commenced within three years after the cause of action has accrued:

* * * * *

4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created."

New York Civil Practice Act § 195 provides:

"§ 195. Suing for benefit of others.

Where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

New York Civil Practice Act § 55 provides:

"§ 55. Action against nonresident.

Where a cause of action, which does not involve the title to or possession of real property within the

state, accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply."

California Code of Civil Procedure § 359 provides:

"§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created."

California Code of Civil Procedure § 382 provides:

"§ 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

Specification of Errors to be Urged

The Circuit Court of Appeals erred

1. In holding that petitioners were not entitled to the protection of the New York and California statutes of limitations.

2. In failing to hold that the jurisdiction in equity exercised in this case was merely concurrent with jurisdiction at law so as to require the application of limitations.

3. In failing to hold that the nature of the right asserted against petitioners by the plaintiffs was essentially one at law requiring the application of limitations regardless of the equitable form of the remedy.

4. In holding that the respondents were not guilty of laches.

5. In holding that the petitioners were owners, within the meaning of the statute, of the Ohio Joint Stock Land Bank stock registered in their names.

POINT I

The applicable three-year New York and California statutes of limitations barred this action eight months before its inception.

It is conceded that the bill of complaint herein was filed on December 16, 1931 (R. 1), that the cause of action accrued in April 1928 (R. 423; 104 F. [2d] at 172), and that the New York and California three-year statutes of

limitation for stockholders of moneyed corporations[2] barred this action unless the old equity doctrine of laches shall intervene to rescue the plaintiffs from the effect of the lapse of time. The Second Circuit Court of Appeals so held (R. 420-35, 104 F. [2d] 169), affirming the District Court (20 F. Supp. 930 and 936).

The petitioners Pleasants, Wing, Miller, and Steers are residents of New York (R. 365-6), and claim the protection of the New York statute of limitations. The petitioner Russell is a resident of California (R. 365), and claims the protection of the California statute of limitations made applicable by the New York statute.[3]

A. The New York and California statutes completely bar the action.

The California statute of limitations being made applicable in favor of the petitioner Russell by the statute of the forum, New York, and the two statutes being identical in substance and effect, the case may be dealt with as if the New York statute were alone involved.[4]

The New York statute is specifically directed to the *statutory* liability of stockholders of moneyed corporations. Apart from any question of the effect of the old equity doctrine of laches, it would concededly govern this action, as was held by the District Court in 1 F. Supp. 788, 789, 20 F. Supp. 930, 934, and also by the Circuit Court of Appeals, R. 427, 104 F. (2d) at 174.

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[2]New York Civil Practice Act §49, California Code of Civil Procedure §359, quoted at pp. 10, 11 above.

[3]See New York Civil Practice Act §§49, 55, California Code of Civil Procedure §359, quoted at pp. 10-11 above.

[4]So considered by the Circuit Court of Appeals, R. 421, 104 F. (2d) at 171.

Nevertheless both the Circuit Court of Appeals and the District Court, following Patterson, *D.J.* in 1 F. Supp. 788, held that the old equity doctrine of laches created an exception to the New York and California statutes and would allow the plaintiffs to maintain their action in a Federal court of equity after the period prescribed by the State statutes as an absolute bar, if they could show that the delay was excusable. It is noteworthy that the decision of Patterson, *D.J.*, which lay at the basis of this holding, was rendered November 2, 1932, six years before this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, overthrew the doctrine of *Swift* v. *Tyson*. In the *Tompkins* case this Court said, 304 U. S. at 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . *There is no federal general common law.*"

And at page 79 the Court quoted with approval the language of Holmes, *J.* in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349:

> "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

By *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 205, it was pointed out that the doctrine of the *Tompkins* case extends to suits in equity.

By its terms the New York statute completely bars the action, limiting as it does to three years an action against

> "a stockholder of a moneyed corporation . . . to enforce a liability created . . . by statute."

The double liability sought to be imposed upon the petitioners was created by statute, and had no antecedent existence either at common law or in equity. The Circuit Court of Appeals acknowledged that "the basis of this action is purely statutory" (R. 424, 104 F. [2d] at 172). In the State court, the action could not have been instituted after April 1931. This Court so indicated in *Platt* v. *Wilmot*, 193 U. S. 602, 613, in holding a suit to enforce stockholders' liability under a Kansas statute barred by the New York three-year statute, New York Code of Civil Procedure § 394[5]:

> "We think, within the meaning of Section 394, this liability was created by statute, as it was by virtue of the statutes that the contractual liability arose. The language of the section plainly includes this case."

The system of limitations laid down by the New York statutes not only provides specifically for this action by Civil Practice Act § 49, but excludes the doctrine of laches by providing in § 53 for a limitation of ten years upon actions not specifically provided for.[6] The result of this statutory scheme is to abolish the doctrine of laches entirely in New York where the relief asked relates to matters of right. *Pollitz* v. *Wabash R. Co.*, 207 N. Y. 113, 130; *Coit* v. *Campbell*, 82 N. Y. 509, 514.

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[5]The predecessor of Civil Practice Act §49, subd. 4, quoted at p. 10 above.

[6]New York Civil Practice Act §53. "Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Consequently, the re-appearance of the doctrine of laches in Federal equity actions in New York is contrary to the rule of the *Tompkins* case. For, while limitation is a procedural matter not embraced within the rule of the *Tompkins* case, laches on the contrary is a matter of substantive law. It rests on affirmative doctrines of conscience, good faith, and reasonable diligence, and requires on the facts of each case an affirmative determination of prejudice resulting from delay. This Court has repeatedly pointed out that laches turns not merely upon lapse of time but also upon the nature and evidence of the plaintiff's rights, all the circumstances of the case, and the nature and strength of intervening rights and equities. See for example *Galliher* v. *Cadwell*, 145 U. S. 368, 371-2; *Penn Mutual Life Insurance Company* v. *Austin*, 168 U. S. 685, 697; *Graham* v. *Boston etc. R. Co.*, 118 U. S. 161, 179.

Although the question is one of novel impression such as would hardly have arisen before *Erie R. Co.* v. *Tompkins* drew the line between substantive law and procedure,[7] laches seems clearly to be a doctrine of substantive law. As no such doctrine is recognized in the State of the forum, it is submitted that the rule of the *Tompkins* case does not permit it to be applied by the Federal courts in that State as a part of any Federal general common law. If this were not so, the effect would be, contrary to the doctrine of the *Tompkins* case, to import into the Federal law rules of substantive law not recognized by the State in which the court sits. The fact that the State statute of limitations is uniformly regarded as procedural, does not in any way warrant the conclusion reached by the courts below that those courts

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[7] *Cf.* Note in 1938 Columbia Law Review p. 1472.

might continue to apply in equity the substantive law doctrine of laches not recognized in the State practice.

B. Under existing Federal precedents application of the New York statute of limitations was dictated by the existence of a concurrent jurisdiction in law and equity.

It was conceded by the Circuit Court that, in the event of concurrent jurisdiction at law and in equity, the bar of limitations at law cannot be escaped by a plaintiff through the selection of the equitable remedy[8] (R. 423, 104 F. [2d] at 172). But that Court erroneously concluded that concurrent jurisdiction did not exist and that the present action is exclusively equitable in both form and substance.

This error arose from a misinterpretation of the language used by this Court in *Christopher* v. *Brusselback*, 302 U. S. 500, 502. There in describing the decision in *Wheeler* v. *Greene*, 280 U. S. 49, this Court pointed out that the means for enforcement of the liability of the stockholders of national banks provided by the National Banking Act, did not exist with respect to joint stock land banks, and that:

> "The only means of enforcing the liability left to creditors of a Joint Stock Land Bank, as the Court pointed out in the *Wheeler* Case, is an adversary suit in equity against the stockholders wherever they may be found."

The opinion of Holmes, *J.*, in the *Wheeler* case referred to was less sweeping in its description of the equitable remedy, saying merely (280 U. S. at 51-2):

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[8]See *Metropolitan National Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448; *Baker* v. *Cummings*, 169 U. S. 189.

> "The stockholders are to be held only 'equally and ratably'. And, to say the least, the bill in equity is the most likely way of reaching that result."

Neither the description by Holmes, *J.* of the equitable remedy as the most likely way nor that by Stone, *J.* as the only means of enforcing the liability left to creditors of a joint stock land bank, *necessarily excludes concurrent jurisdiction at law.* In fact, jurisdiction primarily lies at law by virtue of the fact that money is the measure of the liability imposed upon the defendants by the statute, and by virtue of the fact that the deficiency in the assets of the Ohio Joint Stock Land Bank greatly exceeded its $250,000 capital (R. 370). Under these circumstances, an accounting as among the defendants and other stockholders or an accounting as against the defendants was alike unnecessary for the due enforcement of the simple money liability imposed by statute.

The liability of the defendants as stockholders being determinable in a fixed amount of money by virtue of the statute and the financial condition of the corporation, an action to recover this liability would clearly lie at law. It is so held, for example, in *Weeks* v. *Love*, 50 N. Y. 568, 570; *Van Hook* v. *Whitlock*, 3 Paige Ch. 409, 416. Under New York Civil Practice Act § 195 and California Code of Civil Procedure § 382, indeed, the plaintiffs might have stated a representative claim at law for the benefit of the whole class, without resort to equity. *McKenzie* v. *L'Amoureux*, 11 Barb. 516; *Kirk* v. *Young*, 2 Abb. Pr. 453; *Cherry* v. *Howell*, 4 F. Supp. 597, 599, affirmed 66 F.(2d) 713 (C. C. A. 2, 1933); *cf. Penny* v. *Central Coal & Coke Co.*, 138 F. 769, 773 (C. C. A. 8, 1905); *Stearns Coal and Lumber Co.* v. *Van Winkle*, 221 F. 590, 592 (C. C. A. 6, 1915), certiorari denied 241 U. S. 670.

The only justification given by the Circuit Court for treating the case as one of exclusively equitable cognizance is that *Wheeler* v. *Greene*, 280 U. S. 49, prevents a suit by the receiver and requires a creditors' representative action (R. 244; 104 F. [2d] at 172). Yet obviously the requirement so inferred is one of form, not of substance. The *substance* of the action continues to be the enforcement of a *legal claim*. The correct analysis of such an action, as has been pointed out by the New York court in *Potter* v. *Walker*, 276 N. Y. 15, is that the equitable form impressed upon an action by its derivative or representative character, does not change the substance of the claim as one at law nor alter the rule of limitations applicable at law. In this conclusion the New York court only followed Lurton, *J.* in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, 648, 15 S. W. 448. The same rule, based upon the same analysis, is applied by the California courts to derivative actions in equity. *Spencer* v. *Anderson*, 193 Cal. 1, 222 Pac. 355, 358 (creditor's bill in equity). See also *Keys* v. *Leopold*, 241 N. Y. 189, 192; *Brick* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259. Perhaps the most recent application of the rule appears in the opinion of the New York Appellate Division, First Department, in *Cwerdinski* v. *Bent*, 256 App. Div. 612, holding that the statute of limitations applicable to actions at law bars a minority stockholder's derivative action in equity to recover alleged excessive bonuses received by defendant directors.[9]

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[9]Cases like *Terry* v. *Little*, 101 U. S. 216 (1879), and *Pollard* v. *Bailey*, 20 Wall. 520 (1874), do not support the decision below, because in neither case did it appear that a 100% assessment was necessary and both arose in States which at the time maintained the traditional separation between equity and common law procedure.

C. The nature of the right here involved being exclusively legal, enforcement is barred by the period of limitations at law regardless of the equitable form of the remedy.

That the right sought to be enforced in this action is purely statutory and the relief invoked hence not strictly equitable, is obvious and was conceded by the Circuit Court (R. 424, 104 F. [2d] at 172). The New York courts have pointed out that the statutory liability of a bank stockholder is merely the counterpart of the common law liability of partners to creditors. *Lang* v. *Lutz,* 180 N. Y. 254, 258; *Howarth* v. *Angle,* 162 N. Y. 179, 187-8. As such, it is contractual in nature. *Van Tuyl* v. *Schwab,* 174 App. Div. 665, 668, affirmed 220 N. Y. 661; *Howarth* v. *Angle,* 162 N. Y. at 187. The same analysis is made by this Court:

> *Platt* v. *Wilmot,* 193 U. S. 602, 613;
> *McDonald* v. *Thompson,* 184 U. S. 71, 74.

The New York cases just cited show that this analysis is not affected by the appearance in the statute of the words "equally and ratably".

The basis of the action being exclusively legal, therefore, even if it were true that the adjustment of the rights of creditors among themselves, or other circumstances, left a bill in equity as the only remedy available for enforcement of this right at law, the decisions of this Court establish that such an action is barred by limitations and not by laches.

> *Curtis* v. *Connly,* 257 U. S. 260;
> *McDonald* v. *Thompson,* 184 U. S. 71;
> *Morgan* v. *Hamlet,* 113 U. S. 449;

Godfrey v. *Terry*, 97 U. S. 171;
Carrol v. *Green*, 92 U. S. 509.

While some of these actions might have been brought at law and so may be said to fall under the doctrine of concurrent jurisdiction just discussed, at least two were quite as exclusively equitable as the present action is asserted by plaintiffs to be. *Godfrey* v. *Terry* was a bill in equity filed in the United States Circuit Court for the District of South Carolina by a creditor of a South Carolina bank to enforce the statutory liability of defendant stockholders. At page 180 this Court said:

> "We are further of opinion that as to those who were then stockholders the Statute of Limitation is a perfect bar, and no action can be maintained against them."

So in *Carrol* v. *Green* this Court applied the South Carolina statute of limitations to a bill in equity by creditors to enforce the statutory liability of stockholders of a South Carolina bank. The remedy was essentially equitable, as this Court clearly pointed out at page 512 holding that debt could not have been maintained against the stockholders. Moreover the South Carolina statute of limitations did not, like New York Civil Practice Act § 49, apply expressly to actions to enforce the statutory liability of stockholders of moneyed corporations, but was a general statute governing actions upon the case and for debt. Nevertheless this Court thought that the applicability of the statute of limitations to the equitable action was too clear for discussion. 92 U. S. at 516:

> "If a claim like that of the appellees sued at law would have been barred at law, their claim is

barred in equity. This proposition is too clear to require argument or authorities to support it."[10]

This is of course the New York law, as shown by the cases cited at p. 19 above. The same analysis of this kind of action is adopted by the California court and by the Federal courts sitting in California in applying to such actions the California three-year statute of limitations. *Miller* v. *Lane,* 160 Cal. 90, 116 Pac. 58; *Schram* v. *Poole,* 97 F. (2d) 566, 571 (C. C. A. 9, 1938; receiver's bill in equity to enforce statutory liability of stockholders of national bank); *Lord* v. *Morris,* 18 Cal. 482, 486, per Field, *J.*

It is submitted that the authorities do not sustain the conclusion reached by the majority below on this point (R. 424; 104 F. [2d] at 172), and that the scholarly dissent of Judge Clark states the sound view (R. 430-4, 104 F. [2d] at 175-6).

D. The present case clearly illustrates the inequity which will arise from the application of so-called equitable principles.

The statutes of limitation of New York and California which we believe to govern this case, are definite expressions by the respective Legislatures of the public policy affected by belated attempts to enforce the drastic double liability provisions of many banking laws. That the public policy so found and expressed is a salutary one deserving of the favor of the courts, has often been pointed out. See

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[10]See to the same effect Marshall, *C. J.* in *Wilson* v. *Koontz,* 7 Cranch 202, *Hale* v. *Coffin,* 114 F. 567, 575, aff'd 120 F. 470, and *Andrews* v. *Bacon,* 38 F. 777, 778, although the first two are probably cases of concurrent jurisdiction.

Guaranty Trust Company v. *United States*, 304 U. S. 126, 136.

By the principle of limitations, the rights of the parties are determined with clarity and certainty by the mere lapse of time. The injustice which arises in this case from application of the supposedly superior equity principle of laches, on the other hand, is startling. The doctrine of laches is supposed to be based on equity and good conscience; yet the record in this case shows that the plaintiffs have already been over-paid. They paid for their Ohio Joint Stock Land Bank bonds a price of only 50 (R. 373), and have already received thereon dividends of 62.86% of the face amount (R. 317), *i.e.* substantially more than they invested. Their whole investment represents a speculative interest in litigation, as the dissenting Judge pointed out (R. 434, 104 F. [2d] at 177).

These facts sharply illustrate the insubstantial, technical, and wholly traditional character of the principles of equity which respondents successfully invoked below to escape the effects of the local statutes of limitation. So far as the plaintiffs are concerned, equity is here being used to assist an unjust enrichment.

POINT II

Petitioners are not owners, within the meaning of the statute, of the Ohio Joint Stock Land Bank stock registered in their names.

None of the petitioners is or was a beneficial owner of the stock in respect of which the statutory liability is sought to be imposed. The petitioners Russell, Miller, Steers and Wing were a partnership who held 200 shares of the stock

as brokers for a customer, the owner thereof (R. 376). The petitioner Pleasants was the pledgee of 112½ shares of the stock owned by a Maryland corporation, and held the stock to secure a loan made by him to the owner (R. 374-6). On the books of the Ohio Joint Stock Land Bank the respective shares of stock were registered in the names of the petitioners.

The statutory liability was imposed by the courts below upon the petitioners, although not the beneficial owners, because of the rule with respect to record holders of national bank stock under 12 United States Code §§ 63 and 64. See *National Bank* v. *Case*, 99 U. S. 628. The theory of the holding below on this point (R. 422-3; 104 F. [2d] at 171-2) was that the principle established by the decisions under the National Banking Act, 12 U. S. C. A. §§ 63, 64, applies likewise to joint stock land banks despite the striking difference in the phraseology of that statute, 12 U. S. C. A. § 812.

The two statutes begin in the same way. Section 63 provides:

> "The shareholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, to the extent of the amount of *their* stock therein, at the par value thereof, in addition to the amount invested in such shares . . ."

Section 812 begins:

> "Shareholders of every joint-stock land bank organized under this chapter shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent . . ."

At that point, instead of employing the generalized expression applicable to any type of ownership, "their stock therein", Congress differentiates the situation of joint stock land bank shareholders, by concluding the statute as follows:

> ". . . to the extent of the amount of stock *owned by them* at the par value thereof, in addition to the amount paid in and represented by their shares."

Despite this divergence in the statutes, the holding below was that they mean the same in legal effect; that stock "owned" by shareholders was no other than "their" stock; and that record owners not having beneficial ownership are hit by the Farm Loan Act just as by the National Banking Act.

It is submitted that this holding was erroneous for two reasons.

In the first place, the decisive significance of the change which in the Farm Loan Act, § 812, Congress made over the National Banking Act, § 63, is shown by an examination of § 744 in its context. Section 744 of 12 U. S. C. A. is part of a series of provisions, §§ 741-61, dealing with national farm loan associations. These provisions correspond generally to the provisions made at a subsequent point in the statute, §§ 810-24, with respect to joint stock land banks, membership in a national farm loan association being a prerequisite to the obtaining of a loan from a Federal land bank and § 812, relative to the liability of shareholders of joint stock land banks, being identical in terms with § 744. Under these circumstances, if the words "stock owned by them" in § 744 import beneficial ownership and beneficial ownership only, then it would seem a practical certainty that the same words in the same context in § 812 are confined to the same meaning.

Now it is quite certain that by the phrase "owned by them" in § 744 Congress did intend to use a technical word in a technical sense. This appears from the definition of the "owner" in § 733 which provides:

> "If the application for membership [in a national farm loan association] is accepted and the loan is granted, the applicant shall, upon full payment therefor, become the *owner* of one share of capital stock in said farm loan association for each $100 of the face of his loan."

The intention of Congress likewise appears in its use of the words "owner" and "owned" in six other sections of the Act, §§, 716, 717, 694, 745, 853, 771, in contexts where the significance of absolute proprietorship is beyond question.

The reason for this strict and limited use of "owned" and "owner" in the National Farm Loan Act, lay in the peculiar structure and functions which Congress gave to the farm loan associations. These were such that the statutory scheme would be defeated or impaired by a separation of ownership of the stock from ownership of the land and from liability of the shareholder.

The national farm loan associations under the Act were intermediaries between the farmer-borrowers and the land banks (§§ 720, 741). While not organized for profit (§ 711), the associations were required to assume liabilities. To create a fund for this purpose, it was provided that $5 of each $100 of every loan should be withheld (§ 733) and a stock certificate should be issued to represent the amount withheld. This certificate was deposited with the association as collateral security for the loan (§ 733). If the loan was paid, the stock was retired (§ 733). If the association suffered losses, they could be paid from its

capital. In the event the losses exceeded the capital, each share was assessable for an amount equal to the face value of the share (§ 744). Hence, the cost of the loan to the farmer-borrower could never exceed 10% of the loan, *e.g.*, $5 per hundred as the cost of the stock and $5 per share as the amount of the assessment.

Under the scheme the national farm loan association itself was the only possible pledgee of its stock. If a pledgee, the association might also make itself record owner, just as the petitioner Pleasants did in this case. But to subject the association as pledgee and record owner to liability to assessment on the stock would deprive it of one-half of the required safety fund, since the half represented by the assessment could be drawn upon only in the event of insolvency of the association. In such event the association would be unable to respond and the whole statutory scheme would be in danger. Such a contingency must have been foreseen by Congress, which had before it the judicial construction of the words "*their* stock" in the National Banking Act. As a departure from that precedent Congress employed in the Farm Loan Act the word "*owned*" in fixing the liability of shareholders of national farm loan associations, thereby relating assessment liability to beneficial ownership and nothing else, and eliminating mere pledgees, mere record owners, and the like.[11]

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[11]It is noteworthy that in enacting the Federal Reserve Act, two years before the enactment of the Farm Loan Act, Congress also used as a prototype for the definition of shareholders' liability the corresponding provision of the National Banking Act, 12 U. S. C. § 63, but again varied the expressed measure of the liability ("to the extent of the amount of their stock therein") for the purpose of adapting it to the special structure of the Federal Reserve System. The new phrase employed in this connection was "to the extent of the amount of their subscriptions to such stock at the par value

It therefore seems to us incontestable that in the very specialized structure of the national farm loan associations the phrase "stock owned by them" had and was intended to have the strict meaning of beneficial ownership only. In *Wheeler* v. *Greene*, 280 U. S. 49, 51, this Court by Mr. Justice Holmes has already pointed out the weight which should be given to changes of draftsmanship in the Farm Loan Act as compared with that of the prototype, the National Banking Act. It is submitted that the dissent below was right in giving due weight to this point (R. 433; 104 F. [2d] at 176), which the majority ignored.

If the above reasoning is correct with respect to the meaning of the phrase "owned by them" in § 744 (and the respondents practically admitted below that it was), then it seems to us impossible to contend that the identical language in § 812, relating to joint stock land banks, has any different or wider meaning.

In the second place, it is submitted that the courts below overlooked another definite clue to the intention of Congress in employing the phrase "owned by them" in § 812. That is, that the Farm Loan Act does not make provision, as the National Banking Act does, 12 U. S. C. A. § 62, for the inspection of stockholders' lists by creditors. The absence of such a provision in the Farm Loan Act removes one factor of the greatest importance in connection with the imposition of double liability on record owners, *i.e.* the factor of representation and estoppel. While the courts be-

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thereof in addition to the amount subscribed". 12 U. S. C. §502. It cannot be disputed that this expression has a different meaning from the language employed in the prototype, although it is contended in the instant case that the variation of language in the Farm Loan Act did not vary the meaning.

low seem to have felt that there were factors remaining which would justify the broadening of liability to include others than beneficial owners, we believe it is significant that this Court under the National Banking Act has laid emphasis principally on representation and estoppel. *Cf. Pauly v. State Loan Trust Company,* 165 U. S. 606. In holding that representation and estoppel is not the essential basis for the rule adopted under the National Banking Act (R. 423; 104 F. [2d] at 171), the Court below is at odds with the Eighth Circuit Court of Appeals which has held that the entire basis of the liability of shareholders of national banks is estoppel based on the showing of ownership on books made available to the inspection of creditors. *Heiden* v. *Cremin,* 66 F. (2d) 943, 947, certiorari denied 290 U. S. 687.

CONCLUSION

This case involves matters of novel impression and of importance in the construction of the Farm Loan Act and in the proper correlation of Federal and State law, which should be reviewed by this Court, and a writ of certiorari should be issued for that purpose as prayed in the foregoing petition.

Respectfully submitted,

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